

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

ESTATE OF PATRICK CHISM, DECEASED,
BY AND THROUGH ELIZABETH WORD AND
RANDY CHISM, AS MOTHER AND FATHER
AND NEXT OF KIN OF PATRICK CHISM,

PLAINTIFFS

V.

NO. 1:95CV351-B-D

BURLINGTON NORTHERN RAILROAD COMPANY

DEFENDANT

MEMORANDUM OPINION

This cause comes before the court on the second motion for leave to file amended complaint and to remand filed by plaintiff Elizabeth Word, individually as Patrick Chism's mother and as administratrix of Patrick Chism's estate. On February 1, 1996 the court denied a previous motion to add a defendant and to remand. The wrongful death cause of action arises out of a collision between the defendant's train and an automobile driven by Andrew Nathaniel Yeager and occupied by the decedents Patrick Chism, Josh Southard, and Jeremy Sullivan. Plaintiff Word seeks leave to add Yeager's estate as a nondiverse defendant.¹

Under the general rule, diversity jurisdiction in actions originally brought in federal court is determined at the time of the commencement of the action and, in removed actions, at the time of commencement or removal. See 28 U.S.C. § 1446 (b) (an action

¹This cause was removed on the ground of diversity jurisdiction.

not removable upon commencement may become removable by amended pleadings or dismissal of a party). However, "[t]he inquiry into the existence of complete diversity requires considering the citizenship even of absent indispensable parties." Bankston v. Burch, 27 F.3d 164, 168, 169 (5th Cir. 1994) (remand to state court was mandatory since "parties may not manufacture diversity jurisdiction by failing to join a nondiverse indispensable party"). Accordingly, joinder of a nondiverse party, who is indispensable at the commencement of the action, divests a federal court of diversity jurisdiction. See Freeport-McMoRAN, Inc. v. KN Energy, Inc., 498 U.S. 426, 428, 112 L. Ed. 2d 951, 954 (1991) (action originally brought in federal court).

The addition of parties in removed actions is further governed by 28 U.S.C. § 1447(e) as follows:

If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

This statute codifies an exception to the general rule that post-removal developments will not divest the federal court of diversity jurisdiction. Yniques v. Cabral, 985 F.2d 1031, 1034 (9th Cir. 1993) (§ 1447(e) codifies the principle that a district court permitting joinder of a nondiverse party to a removed case should remand the case to state court) (citing, e.g., Hensgens v. Deere & Co., 833 F.2d 1179, 1182 (5th Cir. 1987)); Heininger v. Wecare

Distributors, Inc., 706 F. Supp. 860, 862 n.4 (S.D. Fla. 1989) ("Section 1447(e) is essentially a codification of Hensgens"). The court in Hensgens stated:

[M]ost post-removal developments--amendment of pleadings to below jurisdictional amount or change in citizenship of a party--will not divest the court of jurisdiction but an addition of a nondiverse defendant will do so.

833 F.2d at 1181. Prior to the enactment of § 1447(e) as part of the Judicial Improvements and Access to Justice Act of 1988, the circuits were split on the issue of "whether a non-diverse party must be 'indispensable' within the meaning of Rule 19(b) [of the Federal Rules of Civil Procedure] before that party could be joined and diversity destroyed." St. Louis Trade Diverters, Inc. v. Constitution State Ins. Co., 738 F. Supp. 1269, 1270 (E.D. Mo. 1990) (citing Heininger, 706 F. Supp. at 861). Without the benefit of section 1447(e), the Fifth Circuit in Hensgens held that a nondiverse party need not be indispensable under Rule 19(b) before allowing a joinder which would destroy diversity jurisdiction and require remand. 833 F.2d at 1182.² The court concluded that a district court should use its discretion in deciding whether to allow joinder rather than make a rigid distinction between indispensable and permissive parties. Id. Consistent with the Hensgens approach, "[i]t is clear from the unambiguous language of

²Although decided prior to the enactment of § 1447(e), Hensgens is applied in construing the statute. O'Connor v. Auto. Ins. Co., 846 F. Supp. 39, 41 n.2 (E.D. Tex. 1994).

§ 1447(e) that a non-diverse party need not be indispensable as defined by Fed. R. Civ. P. 19 in order for a district court to permit joinder and remand the action to state court." Heininger, 706 F. Supp. at 862 (emphasis added). "Congress has given the [district court] two options: Either deny the joinder, or grant it and remand the case." O'Connor v. Auto. Ins. Co., 846 F. Supp. 39, 41 (E.D. Tex. 1994).

The court in Hensgens set forth factors "to balance the defendant's interests in maintaining the federal forum with the competing interests" of avoiding "the danger of parallel federal/state proceedings with the inherent dangers of inconsistent results and the waste of judicial resources." Id. at 1182. The court set forth the appropriate inquiry:

For example, the court should consider the extent to which the purpose of the amendment is to defeat federal jurisdiction, whether plaintiff has been dilatory in asking for amendment, whether plaintiff will be significantly injured if amendment is not allowed, and any other factors bearing on the equities.

Id. In an action against insurance companies for failure to pay insurance proceeds, the court weighed the Hensgens factors and disallowed joinder of an insurance agency pursuant to § 1447(e). O'Connor, 846 F. Supp. at 41. Cf. St. Louis Trade Diverters, Inc., 738 F. Supp. at 1271 (allowing joinder of nondiverse defendants and remand under the Hensgens approach). Heininger, 706 F. Supp. at

862 (allowing joinder of nondiverse manufacturer and remand of products liability action originally brought against seller).

In this action the court notes that, as in St. Louis Trade Diverters, Inc., the plaintiff's original counsel³ who drafted the state court complaint have withdrawn. It is clear that Yeager's estate was not named as a defendant since the plaintiff's original counsel also represent Yeager's estate and family. The current counsel for plaintiff Word also represents the plaintiff in Sullivan's state court wrongful death action against Burlington and Yeager's estate. (Cantrell, individually and in behalf of Wrongful Death Beneficiaries of Jeremy Sullivan (Deceased) v. Estate of Nathan Yeager,⁴ Deceased and Burlington Northern Railroad Company, Monroe County Circuit Cause No. CV-95-313-RM). The court finds that under the circumstances the plaintiff should not be held accountable for failing to originally name Yeager's estate or for any delay in seeking the proposed amendment. The instant motion was filed shortly after plaintiff Word filed a motion to substitute counsel and even prior to the filing of her original counsel's notice of withdrawal. For the same reason, the court cannot

³One of the four original attorneys representing the plaintiff herein remains the attorney for the deceased Chism's father and sister. The other three attorneys asserted their representation of Yeager's parents in a notice of withdrawal filed in this cause.

⁴Same as Andrew Nathaniel Yeager.

conclude that the proposed amendment is sought primarily for the purpose of defeating federal jurisdiction.

It is undisputed that Yeager's estate would be a proper party to this action.⁵ In fact, the defendant's answer implicitly alleges liability on the part of Yeager's estate:

The sole proximate or contributing cause of the accident complained of and any damages or injuries alleged in the Complaint was the negligent actions or omissions of individuals or entities over which Defendant BN exercised

⁵The dispute is whether Yeager's estate is an indispensable party under Rule 19(b). The court has concluded that it is unnecessary to address that issue in ruling on the instant motion.

no control,...or such negligent actions or omissions constitute an intervening cause of the accident complained of and any injuries or damages alleged in the Complaint for which Defendant BN bears no legal responsibility.

The defendant does not refute the plaintiff's assertion that Yeager is the only possible person implicated in the above-quoted defense. Clearly, if joinder is disallowed, filing a parallel action in state court would be the plaintiff's only recourse against Yeager's estate.⁶ Upon disposition of this cause, the defendant will not be subject to further litigation, pursuant to the Wrongful Death Statute, whereas the plaintiff may be subject to inconsistent results and/or incomplete relief in a separate state court action against Yeager's estate as a joint tortfeasor. The defendant has invoked Miss. Code Ann. § 85-5-7 for an apportionment of fault between it and Yeager's estate. The statute provides that⁷ "a joint tort-feasor shall be liable only for the amount of damages allocated to him in direct proportion to his percentage of fault."

⁶The Mississippi Wrongful Death Statute requires all interested plaintiffs to join in a single action:

there shall be but one (1) suit for the same death which shall ensue for the benefit of all parties concerned, but the determination of such suit shall not bar another action unless it be decided on its merits.

Miss. Code Ann. § 11-7-13. The statute "does not operate to bar another action unless the matter is decided on its merits." Brown v. Dow Chemical Co., 777 F. Supp. 504, 507 (S.D. Miss. 1989)

⁷"Except as otherwise provided in subsections (2) and (6) of this section...."

§ 85-5-7(3). Having both defendants in this action would promote the efficient use of judicial resources and remand is appropriate in the absence of a significant federal interest in deciding the state law issues raised in this cause. Had plaintiff Word been represented by her current counsel from the outset, there is a high probability that this cause would not have been removable since Yeager's estate would have been named as an original defendant as in Cantrell. Having weighed the relevant equities pursuant to Hensgens, the court concludes that joinder coupled with remand is justified pursuant to § 1447(e).⁸

THIS, the _____ day of June, 1996.

NEAL B. BIGGERS, JR.
UNITED STATES DISTRICT JUDGE

⁸The same relief would be appropriate in the related removed action, In Re the Estate of Josh Southard, Deceased v. Burlington Northern Railroad Company, Cause No. 1:95CV350-B-D. The same attorneys who withdrew from the instant cause have filed a notice of withdrawal in Southard. However, no motion to amend to join Yeager's estate has been filed in that action.